SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1360

SHEARN MOODY, JR., *Petitioner*,

v.

FLYING SAUCERS, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM D. DECKER
MARKWELL, STUBBS, DECKER,
DALEHITE & YOUNGBLOOD
307 Cotton Exchange Building
Galveston, Texas 77550

E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue
Washington, D. C. 20006

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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No.

SHEARN MOODY, JR., *Petitioner*,

v.

FLYING SAUCERS, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in the above-entitled case on January 27, 1970.

OPINION AND ORDERS BELOW

The order of the United States District Court for the Southern District of Florida dismissing respondent's complaint and quashing its service of process on

petitioner was dated April 21, 1969, was filed on April 24, 1969, is not reported, and is printed as Appendix B hereto.

The opinion and judgment of the Fifth Circuit Court of Appeals reversing the District Court's order were rendered on January 27, 1970, are not yet reported, and are printed as Appendix B hereto.

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals were rendered on January 27, 1970. On February 6, 1970, petitioner filed a timely petition for rehearing, which was denied on February 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

At each stage of these proceedings, petitioner has relied upon the constitutional and statutory grounds asserted herein.[1]

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the statutory provision involved is Florida Statute § 48.181. Both are printed as Appendix A hereto.

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[1] For example, in his brief on the merits in the Court of Appeals (p. 9), petitioner asserted: "Finally, Appellee respectfully suggests to this Court that to allow Florida to have jurisdiction over this Defendant under its Long-Arm Statute, in the fact situation now before the Court, would violate the Constitutional standards of due process as expressed in *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L. ed 2d 223 (1957), and *Hanson* v. *Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L. ed 2d 1283 (1968)."

QUESTIONS PRESENTED

1. In a diversity case, may a Court of Appeals disregard an entire series of state court decisions (including decisions by the state's highest court) which strictly and narrowly construe the state's long-arm statute, and rely instead, on the theory of stare decisis, upon one of its own prior decisions extending the state statute as far as due process allows?

2. Was it a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution for petitioner, an individual and a resident of Texas, to be served in a diversity case brought in Florida, by (a) service on the Florida Secretary of State and (b) mail service on petitioner and his attorneys in Texas, where the record does not show that petitioner was ever in Florida, and the sole activities of his agents in Florida consisted of arrangements for the purchase of a single pleasure yacht?

3. May a state long-arm statute be extended as broadly to an individual as it is to a corporation?

STATEMENT

Petitioner is an individual residing in Galveston, Texas (A. 8, 13)[1] and a citizen of Texas (A. 1). Respondent is a Florida corporation with its principal place of business in Miami (A. 1). In April 1968, petitioner spoke with one of respondent's major shareholders about the purchase of an oil screw hydrofoil for $80,000 in cash and 22,500 shares[2] of the capital stock of The Empire Life Insurance Company of

[1] "A" refers to the Appendix filed in the Court of Appeals and in this Court containing the record below.

[2] The Court of Appeals incorrectly stated the figure as 22,000.

America, an Alabama corporation (A. 4). The record does not show where this conversation took place. In essence, petitioner told the shareholder that subject to a survey, he wanted to buy the vessel, and a trial run was arranged for the following day. Petitioner's agent came from Texas to Florida for the survey, and the vessel was towed down a river for the trial run. The agent authorized a local company to perform miscellaneous repairs to the vessel and to furnish it with supplies (*ibid.*). A captain was employed, who arranged for dockage and maintenance of the vessel and had tentative preliminary plans drawn up for the conversion of the vessel to a pleasure yacht (A. 5). The captain also negotiated with various vendors as to the cost of conversion and the installation of equipment. On May 17, 1968, respondent recorded a bill of sale in Florida (A. 5-6) and thereafter sent the documents necessary for closing the sale to petitioner's attorney in Texas, who acknowledged their receipt (A. 6).

When petitioner declined to complete the purchase, respondent brought a diversity suit in the United States District Court for the Southern District of Florida for the entire amount of the purchase price, alleged to be $157,500. Service of the complaint was attempted by (a) mailing copies (return receipt requested) to petitioner and two of his attorneys, all of whom were in Texas, and (b) filing a copy with the Florida Secretary of State. Petitioner and his attorneys signed the return receipts, and the Secretary of State acknowledged receipt of his copy.

Petitioner objected to the attempted service, and on April 21, 1969, the District Court, citing a number of Florida cases, granted his motion to quash the service

of process and dismissed the complaint for lack of jurisdiction (App. B).

The Fifth Circuit Court of Appeals reversed, relying in part on one of its own decisions interpreting Florida law some three years before, and indicating that no Florida decisions had intervened. Holding that the Florida long-arm statute should be liberally applied and interpreted "as broadly as consistent with due process," the court ruled that petitioner had carried on a "business or business venture" in Florida within the meaning of Florida Statute § 48.181(1) (App. A).

The court also held that when petitioner offered to pay for the yacht partly in cash and partly in stock, this constituted a "sale" of the stock within the meaning of Florida Statute § 48.181(3) (App. A).

ARGUMENT

I. The Court of Appeals laid down a rule of law that cannot be sustained, and it did not even follow the rule it laid down. The court held that while federal courts must look to state court decisions for a construction of a state statute, "where our court has construed such a statute and no intervening state court decision has placed a different construction on it, the rule of stare decisis binds us to our earlier decision just as it does with respect to any other matter with which the court has to deal." It then relied upon a Fifth Circuit case decided three years before,[1] which in turn relied upon still another Fifth Circuit decision

[1] *Phillips* v. *Hooker Chemical Corp.*, 375 F.2d 189 (5th Cir. 1967).

decided in 1964,[5] for the proposition that the Florida long-arm statute "was intended to be applicable to the fullest extent permissible within constitutional limits upon the state's power to act extraterritorially." It found the Florida case most nearly in point to be *William F. Strasser Const. Corp.* v. *Linn*, 97 So.2d 458 (Fla. 1957), a case decided over twelve years prior to the present case and during the very year in which the Florida legislature *amended* the state statute to add one of the two sections relied upon by the Court of Appeals.[6]

We submit that a Court of Appeals in interpreting a state statute is not bound by its own stare decisis but rather is under a continuing obligation to review state court decisions for the evolving meaning of that statute. Otherwise, either state law is determined for all purposes in the federal courts—an improper forum[7]—or state law is determined one way in the state courts

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[5] *Delray Beach Aviation Corp.* v. *Mooney Aircraft Co.*, 332 F.2d 135 (5th Cir. 1964).

[6] Even the reliance on *Linn* was entirely misplaced. There, out-of-state residents, through an agent, engaged the services of a Florida corporation to construct a three-unit apartment house on property which the out-of-state residents owned in Florida. That is hardly comparable to the situation here. Moreover, *Linn* made it clear that the long-arm statute, far from reaching the outer limits of due process, was to be "strictly construed," with the parties invoking the statute carrying "the burden of presenting a situation that clearly justifies the application of the Act" (97 So.2d at 459).

[7] *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938); *Rosenthal* v. *New York Life Ins. Co.*, 304 U.S. 263 (1938); *Six Companies* v. *Joint Highway District*, 311 U.S. 180, 187-188 (1940); *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945); *Gibson* v. *Phillips Petroleum Co.*, 352 U.S. 874 (1956); Rules of Decision Act, 28 U.S.C. § 1652.

and another in the federal courts—an equally objectionable result.[8]

In this case, the Court of Appeals, relying on its own decisions of prior years and one obviously out-of-date state court decision, ignored an entire raft of more recent Florida cases making it manifestly and abundantly clear that, far from extending the state's long-arm jurisdiction to constitutional limits, the Florida statute is to be narrowly construed, and the party seeking to rely on constructive service carries a heavy burden of proving that the activities of the party being served clearly come within the statute's restrictive ambit.

Thus, in 1960, an intermediate appellate court in Florida ruled that Illinois residents who engaged a Florida agent to sell Florida property and then signed documents sent to them by their Florida agent, including a purchase money mortgage and an installment note designating a Florida bank as collection agent, were not engaged in a "business" or a "business venture" within the Florida long-arm statute. Quoting from an earlier opinion of the Florida Supreme Court, the intermediate court held:

> The cited statute provides a method of substituted service of process in lieu of personal service. It is therefore necessary that one invoking the provisions of the statute carry the burden of presenting a situation that clearly justifies the applica-

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[8] See Note, "In Personam Jurisdiction over Foreign Corporations: An Interest-Balancing Test," XX Univ. of Fla.L.Rev. 33, 41-46 (1967), which points out that very early Florida cases giving a liberal interpretation to the statute were subsequently overruled by "restrictive" decisions narrowly interpreting the State's long-arm jurisdiction.

> tion of the Act. Statutes of this nature are strictly construed and parties seeking to invoke them are required to bring themselves clearly within the provisions of the Act in order to render the substituted service of process effective against the defendants. [*Toffel* v. *Baugher*, 125 So. 2d 321, 323 (Fla. Dist. Ct. App. 1960), cert. discharged, 133 So. 2d 420 (Fla. 1961).[9]]

Five years later, the Florida Supreme Court itself took precisely the same position. It held that the long-arm statute "must be strictly construed and one seeking to effect service under it has the burden of presenting facts which clearly justify its applicability." *Young Spring & Wire Corp.* v. *Smith*, 176 So. 2d 903, 905 (Fla. 1965).

In *Sausman Diversified Investments, Inc.* v. *Cobbs Co.*, 208 So. 2d 873 (Fla. Ct. App. 1968), the fact that

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[9] Similarly, in *Fawcett Publications, Inc.* v. *Rand*, 144 So.2d 512 (Fla. Dist. Ct. App. 1962), *cert. denied*, 155 So.2d 618 (Fla. 1963), the court held service improper on a Delaware corporation with offices in Connecticut even though the company received orders for magazines from Florida wholesalers and distributors who were independent contractors and who bought the magazines for resale to newsstands which in turn sold them to the general Florida public. To the same effect, see *Fawcett Publications, Inc.* v. *Brown*, 146 So.2d 899 (Fla. Ct. App. 1962).

In *Illinois Central R.R.* v. *Simari*, 191 So.2d 427 (Fla. 1966), substituted service of process by a passenger plaintiff against a railroad defendant alleging injuries to the passenger which occurred in an accident outside Florida was held improper even though the railroad maintained two permanent offices in Florida staffed by thirteen permanent employees.

And in *Hayes* v. *Greenwald*, 149 So.2d 586, 587 (Fla. Ct. App. 1963), the court said that "The isolated action of selling a home, by one who moves to another state, does not amount to a business venture within the meaning and intent" of the Florida statute. See *James* v. *Kush*, 157 So.2d 203, 205 (Fla. Dist. Ct. App. 1963), reaching the same result in view of the fact that "the statute should be strictly construed."

the plaintiff had executed a franchise agreement in Florida and that the defendant nonresident franchisee, which signed the franchise agreement in Pennsylvania, was required under the terms of that agreement to permit the plaintiff to supervise its activities, supply it with merchandise, direct its operations, and do various other supervisory acts in Florida did not mean that defendant was "doing business" within Florida. The court held that the long-arm statute "should be strictly construed and that the party seeking to invoke its benefits has the burden of clearly showing that the situation presented justifies the application of the statute."

In *Kastan* v. *Kastan*, 222 So. 2d 55 (Fla. Dist. Ct. App. 1969), *cert. denied*, 226 So. 2d 818 (Fla. Supreme Ct. 1969), the court held a foreign corporation not amenable to the state long-arm statute despite the fact that the corporation entered into a franchise agreement with a Florida land developer for the sale in foreign countries of lands within the state of Florida under installment sales contracts. The statute, said the court, "must be strictly construed, and the burden of presenting a situation that clearly justifies its application is upon the one attempting to invoke the long-arm statute's provisions" (222 So. 2d at 57).

As recently as November 25, 1969 (two months before the Court of Appeals' opinion), the Supreme Court of Florida further restricted the state's long-arm statute. In *DeVaney* v. *Ramsch*, 228 So. 2d 904 (Fla. 1969), the Court specifically held that § 48.181 requires that the party to be constructively served must have engaged in activity within the State for pecuniary gain. It ruled:

> We hold the intent of the Legislature in enacting Florida Statute § 48.181, F.S.A., to be that any individual or corporation who has exercised

> the privilege of practicing a profession or otherwise dealing in goods, services or property, whether in a professional or nonprofessional capacity, within the State *in anticipation of economic gain*, be regarded as operating a business or business venture for the purpose of service under Florida Statute § 48.181, F.S.A., in suits resulting from their activity within the State. As indicated in *Matthews* v. [*Matthews*, 122 So. 2d 571, 573 (Fla. App. 2nd 1960)] the activities of the person sought to be served must be considered "collectively" and show a general course of employment and conduct of carrying on business activity in the State for *pecuniary benefit*. [*Id.* at 907; emphasis added.]

By no possible stretch of the imagination could the alleged purchase of this yacht for pleasure purposes be said to constitute activity engaged in for pecuniary gain.

As for the holding by the Fifth Circuit that when petitioner offered to pay for the yacht partly in cash and partly in stock, this constituted a *sale* of the stock, so as to come within Florida Statute § 48.181(3),[10] this simply will not stand analysis and is directly and flatly contrary to Florida law as interpreted by the Florida courts. In the first place, the "sale" was not through "brokers, jobbers, wholesalers or distributors", as unequivocally required by the statute. Secondly, as the Fifth Circuit itself asserted on a different occasion:

> The argument that the execution of a promissory note by Landstreet's group and its delivery in

[10] In pertinent part: "Any person * * * which sells * * * by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers or distributors to any person * * * in this state shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business venture in this state."

> Florida where it was to be performed constitutes a business venture within the contemplation of section 47.16 Florida Statutes, F.S.A., may be disposed of summarily. The Florida courts have held the contrary, *Odell* v. *Signer*, Fla. App. 1964, 169 So. 2d 851, 853; aff'd, *Signer* v. *Odell*, Fla. 1965, 176 So. 2d 94; and so must we, e.g., *Monarch Ins. Co. of Ohio* v. *Spach*, 5 Cir. 1960, 281 F. 2d 401.
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> * * *
>
> The evidence is undisputed that Landstreet's group purchased Uible's stock and held it as a personal investment to make a profit. As shown above, the stock purchase alone is insufficient to bring Landstreet's group within the reach of the statute. [*Uible* v. *Landstreet*, 392 F. 2d 467, 470 5th Cir. 1968).]

If the execution of a promissory for a purchase could not be a business venture, it is impossible to see how a promise to pay shares of stock as part of a purchase could be a business venture.

Despite all of these cases, the Fifth Circuit ruled that "no intervening state court decision has placed a different construction" on the Florida long-arm statute since 1964, when the court, misreading a 1957 case, held that the Florida courts have "given a liberal application in actual practice" to the statute and have construed it "as broadly as consistent with due process."

We say that the Fifth Circuit was in error. But more importantly, the Fifth Circuit overstepped the narrow lines this Court has drawn around the extent to which federal courts, in attempting to interpret state law, can disregard the statutory reading by the state's own courts and instead interpolate a *federal*

meaning into state law. This is no narrow issue. Increasingly in recent years, complaint has been made to this Court about the practice in some circuits of disregarding or circumventing state law in cases in which state law properly controls. We recognize the natural reluctance of this Court to accept such cases, but surely in a case as blatant as this one, the circuit courts need a reminder that the delicate balance of federal-state relations, already strained in some areas where strain cannot be avoided, should not be put under further stress by the type of ruling rendered in this case.

2. Even assuming that the Court of Appeals was correct in its assumption that the Florida long-arm statute is as broad as due process allows, it erred in holding that due process allows the type of service effected in this case in the light of petitioner's less-than-minimum contacts with the state.

This record does not show that petitioner was ever in the State of Florida. So far as the record reveals, he could have had his conversation with respondent's shareholder in Texas or over the telephone. The subsequent activities of petitioner's agents were of an extremely limited nature and entirely addressed to the preparation for sale of a single yacht to be used for pleasure purposes. There was no continuous course of activity over an extended period of time. There was no activity that looked to permanent or even continuous transactions in Florida as where products are sold to various residents of the state, or structures are built on property within the state. This was, in effect, a single transaction, conducted through agents,

by the removal of a single object to be used for personal reasons, and not for business or gain. Even under the decisions involving corporations, these facts would not support service by mail and on the Secretary of State.[9]

But petitioner is an individual, not a corporation. The Court of Appeals has treated the two as equivalent, as indicated by the test it uses of "doing business" and the cases it cites. The distinction between individuals and corporations is vital and should be maintained by this Court. It was established by *Pennoyer* v. *Neff*, 95 U.S. 714 (1877), and carried forward by *Flexner* v. *Farson*, 248 U.S. 289 (1919), which has never been overruled. As distinguished commentators have said:

> It is questionable whether the fundamental premise of the [Virginia] act, *i.e.*, that the due process requirements for valid personal jurisdiction over individuals are now the same as those for corporations, will be sustained by the courts.
>
> ***
>
> There are obvious distinctions in fact, as there have been traditional distinctions in law [between individuals and corporations]. The historical basis of in personam jurisdiction over the individual was physical power over him. Indeed, this was tangibly demonstrated by the service of writs in which the sheriff took the defendant into cus-

[9] *Cf. International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); *Travelers* v. *Benguet Construction Co.*, 342 U.S. 437 (1952); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson* v. *Denckla*, 357 U.S. 235 (1958) (involving the Florida statute); *Gilbert & Co.* v. *Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961).

body and brought him bodily before the court. In time, the requirement of body attachment was gradually abandoned as the test of jurisdiction and replaced by the test of the individual's physical presence within the territorial jurisdiction of the court. Since corporations are "metaphysical" or "fictional persons," they cannot be physically present anywhere. So traditionally a state obtained jurisdiction over foreign corporations on the theory that a certain amount of activity in the state by employees and agents of the corporation made it "present" within the state. This theory is known as the "doing business" test. Once a corporation is found to be "doing business" within the state, the legal consequences in terms of amenability to suit are precisely the same as where an individual is found to be physically present within the state. The foreign corporation "doing business" may thus constitutionally be sued in the courts of that state on any cause of action, without regard to whether or not the state has any connection with that particular cause of action.

***

*** But in any event, it seems that cases defining "transacting business" as the test of corporate "presence" for purposes of service of process and venue have no relevance where individuals are involved, since metaphors are unnecessary to determine whether an individual is present or not present. [Gibson and Freeman, "Business Associations," 50 Va.L.Rev. 1265, 1272-73, 1275 (1964).]

We respectfully urge the Court to grant certiorari, settle this issue of long-arm jurisdiction over indi-

workers as opposed to corporations, and reverse the judgment of the Court of Appeals.

Respectfully submitted,

WILLIAM D. DECKER,
MARKWELL, STUBBS, DECKER,
DALEHITE & YOUNGBLOOD
307 Cotton Exchange Building
Galveston, Texas 77550

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

Attorneys for Petitioner

APPENDIX A

Florida Statute § 48.181

48.181 Service on nonresident engaging in business in state

(1) The acceptance by any person or persons, individually, or associated together as a copartnership or any other form or type of association, who are residents of any other state or country, and all foreign corporations, and any person who is a resident of the state and who subsequently becomes a nonresident of the state or conceals his whereabouts, of the privilege extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state, constitutes an appointment by the persons and foreign corporations of the secretary of state of the state as their agent on whom all process in any action or proceeding against them, or any of them, arising out of any transaction or operation connected with or incidental to the business or business venture may be served. The acceptance of the privilege is signification of the agreement of the persons and foreign corporations that the process against them which is so served is of the same validity as if served personally on the persons or foreign corporations.

(2) If a foreign corporation has a resident agent or officer in the state, process shall be served on the resident agent or officer.

(3) Any person, firm or corporation which sells, consigns, or leases by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers or distributors to any person, firm or corporation in this state shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business venture in this state.

APPENDIX B

[United States District Court for the Southern District of Florida]

Order Granting Defendant's Motions To Dismiss and To Quash

(Number and title omitted) (Filed: April 24, 1969)

THIS CAUSE came on to be heard on Defendant's Motion to Dismiss for lack of jurisdiction over the person and Defendant's Motion to Quash Service of Process.

The Plaintiff brought this action against the Defendant, a citizen of Texas, for alleged breach of contract, and attempted to obtain jurisdiction over the Defendant pursuant to Florida's long-arm statute, § 48.181, Florida Statutes, by substituted service upon the Secretary of State.

The sole question presented is whether the Defendant's activities in the state constitute "doing business" or engaging in a "business venture" within the meaning of § 48.181, Florida Statutes.

Without reiterating the facts, it appears from a careful examination of the pleadings, affidavit, and, memoranda as well as argument of counsel, that the Defendant's activities surrounding the alleged purchase of the vessel do not amount to "doing business" or engaging in a "business venture" in the state. See *Hayes* v. *Greenwald*, 149 So.2d 586 (Fla. 3rd Dist. 1963); *James* v. *Kush*, 157 So.2d 203 (Fla. 2d Dist. 1963); *Uible* v. *Landstreet*, 392 F.2d 467 (5th Cir. 1968). Cf. *Strasser Const. Corp.* v. *Linn*, 97 So.2d 458 (Fla. 1957); *Florida Investment Enterprises, Inc.* v. *Kentucky Co.*, 160 So.2d. 733 (Fla. 1st Dist. 1964); *O'Connell* v. *Loach*, 203 So.2d 350 (Fla. 2d Dist. 1967).

Thereupon, it is,

ORDERED and ADJUDGED that the Defendant's Motions to Dismiss and to Quash be and the same are hereby granted.

DONE and ORDERED at Miami, Florida, this 21 day of April, 1969.

s/ CHARLES B. FULTON
Charles B. Fulton
Chief Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28052

FLYING SAUCERS, INC., a Florida Corporation,
Plaintiff-Appellant,

versus

SHEARN MOODY, JR., *Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of Florida

(January 27, 1970)

Before BROWN, Chief Judge, TUTTLE and MORGAN, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from an order dismissing a plaintiff's suit for the purchase price of a vessel, such dismissal being based upon a motion to dismiss and quash service under Florida's Long-Arm Statute, Fla. Stats. § 48.181.[1]

Since no evidentiary hearing was held, but the trial court entered the order of dismissal on the simple motion alleging that the defendant was a resident of the State of Texas and had been served only by mail, we must test the correctness of this order quashing service and ordering a dismissal of the action by the contents of the complaint, together with the affidavit attached thereto. There is no dispute of the facts from which the trial court was required to arrive at its conclusion on the question whether Mr. Moody was a "person . . . who [is a] resident of any other state or

[1] Florida Statute 48.181(3):

(3) Any person, firm or corporation which sells, consigns, or leases by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers or distributors to any person, firm or corporation in this state shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business venture in this state.

country" who had accepted "the privilege extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business venture in the state, . . ."

The complaint had attached to it an affidavit, to which no counter affidavit or showing has been made, presenting the following state of facts:

(a) On or about April 18, 1968, the defendant spoke with Johnie Manson, a major stockholder of the Plaintiff corporation, at which time the defendant advised the said Jack Manson that subject to a survey he wanted to buy the oil screw hydrofoil called the DISCO VOLANTE at and for purchase price of $10,000 in cash and 22,000 shares of the capital stock of The Empire Life Insurance Company of America, an Alabama corporation; the defendant told the plaintiff that his attorney was Senator A. R. Schwartz, of Galveston, Texas, and agreed that his attorney would close the transaction with the plaintiff's attorney; a trial run of said vessel was arranged for the following day. Thereafter, the defendant sent his agent, one Rudy Teichman, of Galveston, Texas, to Miami, Florida, to inspect and survey said vessel. That, thereafter, on or about April 19, 1968, at the request of the defendant, said vessel was towed down the Miami River and a trial run conducted under the supervision of the said Rudy Teichman. That the said Rudy Teichman then advised the plaintiff and the defendant that said vessel had passed the survey and authorized and directed Allied Marine Corporation, a Florida corporation, to haul said vessel, to clean said vessel, to paint said vessel, to perform miscellaneous repairs to said vessel, and to furnish miscellaneous supplies to said vessel. Said work was in fact performed by the said Allied Marine Corporation for the defendant. The defendant paid the said Allied Marine Corporation for said services and materials.

(b) Thereafter on or about May 9, 1968, the defendant employed a captain for the said vessel who, at Miami, Florida, contracted with Allied Marine Corporation for: dockage for said vessel; day-by-day care of said vessel con-

sisting of running her engines, pumping her bilges and checking out her lines; and contracted with said Allied Marine Corporation for the preparation of drawings and specifications for the conversion of said vessel to a luxurious day cruiser. Said plans and specifications were in fact completed and delivered to the defendant's agent and master of said vessel, and thereafter the defendant paid said Allied Marine Corporation for said services and materials. Additionally, the captain of said vessel, as agent for the defendant, negotiated with various and sundry vendors of Miami, Florida, for the installation of radios, air conditioning, and other materials; negotiated with Miami shipyards for the conversion of said vessel, and negotiated with a local marine architect for the conversion of said vessel.

(c) Thereafter, on or about May 17, 1968, at the request of said A. R. Schwartz, attorney, of Galveston, Texas, the defendant arranged for the transfer of the title of said vessel to the defendant and the title to said vessel was at Miami, Florida, transferred and registered in the name of the defendant and the recorded bill of sale of enrolled, or licensed yacht, vessel document, and Certificate of Ownership, were forwarded to the said A. R. Schwartz, as agent for the defendant, by mail from Miami, Florida.

(d) Thereafter, the said A. R. Schwartz, attorney, of Galveston, Texas, by Western Union Telegram on May 31, 1968, advised the plaintiff's lawyer in words and figures as follows:

> "Henry Taylor
> 1451 Brickell Avenue
> Miami, Florida
>
> Have received all necessary documents for closing of purchase of vessel DISCO VOLANTE by Shearn Moody, Jr. Mr. Moody is in Europe at the time but cash consideration and stock for balance of purchase will be delivered to you in due course.
>
> A. R. Schwartz, Attorney for
> Shearn Moody, Jr."

It being evident from a casual glance at this statement of facts that the nonresident Moody was actively present in the State of Florida by his several agents for a period of approximately one month from April 19, when defendant caused his representative Teichman of Galveston, Texas, to fly to Miami, Florida, until May 17, when, at the request of admitted counsel for the defendant, title of the vessel was transferred and registered in the name of the defendant and the recorded Bill of Sale of Enrolled, or Licensed Yacht, Vessel Document, and Certificate of Ownership, were forwarded to the defendant by mail from Miami, Florida, we must conclude whether these activities measure the standards as contemplated by the Florida Statute of "doing business' or engaging in "business ventures" in the State of Florida.

We begin our consideration of the question at issue by recognizing that we are here to construe a Florida Statute. In doing so, of course, the federal courts are required to look to the decisions of the Florida courts. However, where our court has construed such a statute and no intervening state court decision has placed a different construction on it, the rule of stare decisis binds us to our earlier decision just as it does with respect to any other matter with which the court has to deal. In light of this proposition, we look to the latest decision of this court dealing with the breadth of transactions that we have heretofore found to fall within the concept of "minimum contacts" that would meet constitutional requirements for a long-arm statute. This we do because our court has on at least two occasions categorically read the Florida cases as deciding that "the Florida courts have given a liberal application in actual practice to Section 47.16. The Florida 'doing business' statutes are construed as broadly as consistent with due process. *Phillips* v. *Hooker Chem. Corp.*, 5 Cir., 1967, 375 F. 2d 189, citing *Delray Beach Aviation Corp.* v. *Mooney Aircraft Co., Inc.*, 5 Cir., 1964, 332 F. 2d 135.

The appellee called to our attention a case relied upon by the district court, *Uible* v. *Landstreet*, 5 Cir., 1968, 392 F. 2d 467. We note that the *Uible* case made no comment upon the breadth of construction as commented on by the earlier *Hooker Chem. Co.* case, but stating that "we must be guided, with respect to the other contentions of Uible, by the accepted principle that causes of this kind 'are not susceptible of an inflexible or fixed rule of law, but must be decided on the facts peculiar to each case as it arises,' Williams v. Duval County Hospital Authority (Fla. App. 1967) 199 So. 2d 299, 301;" and citing other cases, including *Hooker Chemical Corp., supra.* The court then expressly pretermitted "the constitutional issue of due process" apparently concluding that it did not disagree with the statement by this court in *Hooker Chemical, supra,* that the Florida courts had construed the statute "as broadly as consistent with due process." Although a number of the Florida appellate court decisions cited to us speak in terms of construing the long-arm statute strictly, no case has been cited to us where the Florida court has held contrary to our *Hooker* pronouncement to the effect that the Florida statute was intended to be applicable to the fullest extent permissible within constitutional limits upon the state's power to act extraterritorially.

As stated in the *Uible* case and also in *Hooker*, "Causes of this kind . . . must be decided on the facts peculiar to each case as it arises." We conclude that the continual activity of the nonresident in this case in sending his representative to Miami to conduct a trial run of the vessel, his hiring a captain with authority to have repairs made, and having such repairs made and paying for them, and preparing the vessel for meeting the specifications set by the nonresident purchaser, coupled with the consummation of the seller's part of the transaction as to the nonresident purchaser's specific directions to have the necessary documents completed for title to pass, fall well within the concept of "minimum contacts," which in turn

brings it within the power of the state to reach out to obtain service in the manner provided by the Florida statute. The case most nearly similar to this, it seems to us, is the Florida Supreme Court decision, *William E. Stokes Construction Corp. v. Lane*, Fla. So. 2d 438.

The appellant also relies upon subparagraph 3 of Section 48.181 (see footnote 1 above), claiming that the transaction here amounted to a sale by Moody of 22,500 capital shares of stock of Empire Life Insurance Company of America. The appellee disposes it summarily by stating that this was not a sale of stock but was a contract for the purchase of a vessel in return for which payment was to be made by a transfer of this amount of stock. While our opinion thus far may make it unnecessary to reach this second point, we think it appropriate to undertake to construe this section, since appellant relies with equal confidence on this section. Neither party cites any case clearly resolving this issue. However it is difficult to see why an agreement to convey the 22,500 shares of stock does not come within the terminology of paragraph 3 which speaks of selling intangible personal property "by any means whatever." In such circumstances, the statute says that such person "shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business venture in this state."

We conclude that on both grounds the nonresident defendant brought himself within the Florida Statute and was subject to service as provided in Section 48.181.

The judgment is REVERSED and the case is REMANDED to the district court for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 28052

D. C. Docket No. 69-220-Civ-CF

FLYING SAUCERS, INC., a Florida Corporation,
Plaintiff-Appellant,

versus

SHEARN MOODY, JR., *Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of Florida

Before BROWN, Chief Judge, TUTTLE and MORGAN, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is further ordered that defendant appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

January 27, 1970

Issued as Mandate:

FREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1360

SHEARN MOODY, JR., *Petitioner*

v

FLYING SAUCERS, INC., *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL. FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

HENRY H. TAYLOR, JR.
TAYLOR, BRION, BUKER,
HAMES, GREENE & WHITWORTH
1451 Brickell Avenue
Miami, Florida 33131

Counsel for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1360

SHEARN MOODY, JR., *Petitioner*

v

FLYING SAUCERS, INC., *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Respondent prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on January 27, 1970 be denied.

QUESTIONS PRESENTED

1. Was it a violation of the due process clause of the XIV Amendment to the United States Constitution for petitioner, an individual and a resident of Texas, to be served in a diversity case brought in Florida by (a) service on the Florida Secretary of State and (b) mail service on petitioner and his attorneys in Texas, pursuant to the Florida Long Arm Statute, Florida Statute 48.181, under the factual situation presented in the instant cause?

STATEMENT

Respondent adopts the statement of facts as set forth in the Opinion rendered by the Fifth Circuit Court of Appeals in the herein cause, as set forth at pages 3A through 8A of the Appendix to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

The fundamental issue before this Honorable Court is whether or not the defendant's activities in the State of Florida, as reflected in the record on appeal, was sufficient to constitute "doing business" or engaging in a "business venture" within the meaning and purview of the Florida Long Arm Statute, Florida Statute 48.181.

The Fifth Circuit Court of Appeals below concluded that the activity of the defendant in the instant cause created sufficient *minimum contact* to bring the defendant within the reach of the Florida Long Arm Statute. The analysis of the relevant Florida and Federal cases construing the Florida Long Arm Statute as contained in the Fifth Circuit Court of Appeals opinion below is fully adopted by respondent herein.

The petitioner herein first suggests that the Fifth Circuit Court of Appeals below simply disregarded and ignored the raft of Florida cases wherein the Florida Courts have held that the Florida Long Arm Statute is to be "strictly construed." The implication of petitioner's suggestion in his brief is that the Fifth Circuit Court of Appeals gave a "liberal construction" of the Florida Long Arm Statute in adhering to the proposition that the Florida Long Arm Statute "was intended to be applicable to the fullest extent permissible within constitutional limits (due process under the XIV Amendment) upon the State's power to act extraterritorially." Petitioner further suggests that the Fifth Circuit's reliance upon its prior decisions in *Phillips v. Hooker Chemical Corp.*, 375 F. 2d 189 (5th Cir. 1967) and *Delray Beach Aviation Corp. v. Mooney Aircraft Co.*, 332 F. 2d 135 (5th Cir. 1964) in the opinion below, directly conflicts with the "strict

construction" mandate of the subsequent Florida case law construing the Florida Long Arm Statute. It is respectfully submitted that no such conflict exists. As a practical matter what constitutes "sufficient minimum contact" or "engaging in business" or "engaging in a business venture" must be decided on the facts peculiar to each case as it arises. The opinion of the Fifth Circuit Court of Appeals below clearly reflects its recognition of this practical fact of life. So also have the Florida Courts. The Supreme Court of Florida in *Strasser Construction Corp. v. Lyon*, 97 So. 2d 458, (Supreme Court of Florida 1957) in construing the Florida Long Arm Statute said:

> "We have also held that each case of this kind must be resolved on the basis of facts revealed by the record in the particular case. While certain general principles may be said to prevail the application of these principles will be governed by the factual situation presented by a particular record. *Mason v. Mason Products Co.* (Florida 1953); 67 So. 2d 762."

Clearly the classification dichotomy of "strict" versus "liberal" construction of the Florida Long Arm Statute, or any other statute for that matter, is nothing more than a legal justification for a Court's finding that the activities of a particular party constituted minimum contact, or doing business, or engaging in a business venture. Where the Florida Courts have found that no sufficient contact was shown under the facts of a particular case the Florida Courts have simply justified their findings of fact by the legal justification that the Florida Long Arm Statute must be "strictly construed." Conversely, where the Florida Courts have found sufficient minimum contact or activities constituting doing business or engaging in a business venture, the Florida Courts simply determine that the Florida Long Arm Statute is applicable. The suggestion of petitioner that the decision of the Fifth Circuit Court of Appeals below contravenes prior Florida case law is at best an attempt to create a semantic conflict as opposed to a real substantive conflict and should not form the basis for granting of the Petition for Writ of Certiorari herein.

The petitioner next suggests that the Florida Long Arm Statute requires that the party to be constructively served must have engaged in activity within the State of Florida for pecuniary gain. In *Dominguez v. Romsch*, 228 So. 2d 904 (Florida, 1969), the Court held:

> "(2) We hold the intent of the Legislature in enacting Florida Statute Sec. 48.181, F.S.A. to be that *any individual* or corporation who has exercised the privilege of practicing a profession or otherwise *dealing in goods, services or property*, whether in a professional or non-professional capacity, *within the State in anticipation of economic gain*, be regarded as operating a business or business venture for the purpose of service under Florida Statute Sec. 48.181, F.S.A., in suits resulting from their activity within the State. As indicated in Matthews v. *Matthews*, *Matthews*, 122 So. 2d 571, 573 (Fla. App. 2d 1960), the activities of the person sought to be served must be considered "collectively" and shows a general course of employment and conduct of carrying on business activity in the State for *pecuniary benefit*. . . ." (emphasis added)

Petitioner suggests in his brief that by no possible stretch of the imagination could the alleged purchase of this yacht for pleasure purposes be said to constitute activity engaged in for pecuniary gain. Respondent takes issue with this contention. The phrases "*economic gain*," "*pecuniary gain*," or "*pecuniary benefit*" cannot properly be limited to a dollar and cents construction. The activities of Shearn, Moody, Jr., in hiring a captain for the vessel, contracting with Allied Marine Corp. for dockage for the vessel, arranging for day-by-day care of said vessel, contracting for preparation of drawings and specifications for the conversion of the vessel, contracting for services and materials to be supplied for said vessel, negotiating with various vendors in Miami, Florida for installation of radios, air conditioners, and other necessities, was clearly designed to preserve and or enhance the value of the vessel and to prevent the vessel from deteriorating in value. The activities of the petitioner constituted dealing in property within the State in anticipation of economic gain and pecuniary benefit in the nature of pre-

serving and maintaining the asset and enhancing its value.

Petitioner next suggests that the Florida Long-Arm Statute may not be extended to an individual to the same extent that it is extended to a corporation. It is significant to note, however, that at no stage during the proceedings in this cause has there ever been raised any issue with respect to the "constitutionality" of the Florida Long Arm Statute as it relates to an individual. Indeed, the provisions of the Florida Long Arm Statute are clearly intended to extend equally to individuals as well as to corporations. In *McCarthy v. Little River Bank & Trust Company*, 224 So. 2d 338 (Fla. App. 1969), The Third District Court of Appeal of Florida held:

> "(1) There is no question that the provision of Fla. Stat. Sec. 48.181, F.S.A. applies to individuals. The question of whether the individual, Robert McCarthy was engaged in or carrying on a business venture within the State of Florida should be resolved on the basis of the facts revealed by the record in this particular case. See Strasser, supra. We do not believe that the term "business venture" includes or applies exclusively to commercial transactions for benefit. See Kochenthal v. Kochenthal, 28 A.D. 2d 117, 282 N.Y.S. 2d 36 (2nd Dept., 1967); Van Wagenberg v. Van Wagenberg, 241 Md. 154, 215 A. 2d 812 (1965); San Juan Hotel Corp. v. Lefkowitz, 277 F. Supp. 28 (D.P.R. 1967). . . ."

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

HENRY H. TAYLOR, JR.
Taylor, Brion, Buker, Hames,
Greene & Whitworth
Counsel for Respondent

CERTIFICATE OF PROOF OF SERVICE

I, HENRY H. TAYLOR, JR., Attorney for Respondent, FLYING SAUCERS, INC., and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ____ day of April, 1970, I served copies of the foregoing BRIEF OF RESPONDENT IN OPPOSITION on the several parties thereto as follows:

On SHEARN MOODY, JR., Petitioner, by mailing copies in duly addressed envelopes, with first class postage prepaid, to his respective attorneys of record, as follows:

TO: WILLIAM D. DECKER, ESQ., 307 Cotton Exchange Building, Galveston, Texas, 77550, Attorney for Petitioner;

TO: E. BARRETT PRETTYMAN, JR., 815 Connecticut Avenue, Washington, D. C. 20006, Attorney for Petitioner.

HENRY H. TAYLOR, JR.
Attorney for Respondent
1451 Brickell Avenue
Miami, Florida 33131